Puncak Permata Sdn Bhd (under creditors' voluntary liquidation) v Tham Weng Hong & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–993 OF 2007
ZAINUN ALI, HASAN LAH AND MOHD HISHAMUDIN JJCA
9 JUNE 2010

Civil Procedure — Parties — Intervention — Judgment entered in favour of appellant before application for leave to intervene made by second respondent — Final order drawn up and perfected — Proceeding concluded — Whether too late for second respondent to intervene under O 15 r 6(2)(b)(ii) of the Rules of the High Court 1980

The appellant/plaintiff appealed against the decision of the learned judicial commissioner who allowed the second respondent/intervener's application to intervene under O 15 r 6(2)(b)(ii) of the Rules of the High Court 1980 ('RHC'). The appellant was the owner of a piece of land Kuala Lumpur ('the property'). The appellant was put under creditors' voluntary liquidation and liquidators were for the appellant. The liquidators discovered that the property was registered under the first respondent's name. The appellant claimed that the transfer and registration of the property in the first respondent name was fraudulently done by the first respondent. The appellant therefore brought this suit against the first respondent seeking a declaration that the appellant was the legal and beneficial owner of the property and to set aside the registration under the first respondent's name. The first respondent did not file a defence to the appellant's claim and the court allowed the appellant's application for leave to enter judgment against the first respondent. The second respondent later applied to intervene and be joined as the second defendant in the suit. The second respondent claimed that he had entered into a sale and purchase agreement with the first respondent for the purchase of the property. The second respondent also claimed that he had paid full purchase price and was given vacant possession of the property by the first respondent.

Held, allowing the appellant's appeal with costs:
The judgment given by the High Court against the first respondent was based on merits as it was given after the court heard submissions from the appellant's counsel and read the cause papers filed. The final order had been drawn up and perfected. As such the proceeding had clearly concluded. It was therefore too late for the second respondent to intervene under O 15 r 6(2)(b)(ii) of the RHC. The learned judicial commissioner erred in allowing the second respondent's application (see paras 20–21).

[Bahasa Malaysia summary

Perayu/plaintif merayu terhadap keputusan pesuruhjaya kehakiman yang membenarkan permohonan responden kedua/pencelah untuk mencelah di bawah A 15 k 6(2)(b)(ii) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Perayu adalah pemilik sebidang tanah di Kuala Lumpur ('hartanah'). Perayu diletak di bawah likuidasi sukarela pemiutang dan likuidator-likuidator adalah untuk perayu. Likuidator-likuidator mendapati bahawa hartanah tersebut didaftarkan di bawah nama responden pertama. Perayu mendakwa bahawa pindah milik dan pendaftaran di bawah nama responden pertama dibuat secara fraud oleh responden pertama. Perayu oleh itu memfailkan guaman ini terhadap responden pertama memohon untuk perisytiharan bahawa perayu adalah pemilik sah dan benefisial hartanah tersebut dan untuk mengetepikan pendaftaran di bawah nama responden pertama. Responden pertama tidak memfailkan pembelaan terhadap tuntutan perayu dan mahkamah membenarkan permohonan perayu untuk kebenaran untuk memasukkan penghakiman terhadap responden pertama. Responden kedua kemudian memohon untuk mencelah dan dimasukkan sebagai defendan kedua dalam guaman tersebut. Responden kedua mendakwa bahawa dia memasuki perjanjian jual beli dengan responden pertama untuk pembelian hartanah tersebut. Responden kedua juga mendakwa bahawa dia telah membayar harga penuh pembelian dan diberi milikan kosong hartanah tersebut oleh responden pertama.

Diputuskan, membenarkan rayuan perayu dengan kos:
Penghakiman yang diberikan oleh Mahkamah Tinggi terhadap responden pertama adalah berdasarkan merit kerana ia diberikan selepas mahkamah mendengar penghujahan daripada peguam perayu dan membaca kertas kausa yang difailkan. Perintah akhir telah dibuat dan dilengkapkan. Dengan itu prosiding sedemikian jelas selesai. Oleh itu adalah terlalu lewat untuk responden kedua mencelah di bawah A 15 k 6(2)(b)(ii) KMT. Pesuruhjaya kehakiman terkhilaf dalam membenarkan permohonan responden kedua (lihat perenggan 20–21).]

Notes

For cases on intervention, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5569–5612.

Cases referred to

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622, FC (refd)

Hong Leong Finance Bhd v Staghorn Sdn Bhd [2005] 5 MLJ 101; [2005] 2 CLJ 1, CA (refd)

Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd [1998] 4 MLJ 275, CA (refd)

Legislation referred to

National Land Code s 259(3)(a), Form 19G
Rules of the High Court 1980 O 15 r 6, O 15 r 6(2), O 15 r 6(2)(b)(ii), O 83

Appeal from: Civil Suit No S6–22–83 of 2005 (High Court, Kuala Lumpur)

Nad Segaram (Shearn Delamore & Co) for the appellant.
CK Yeoh (Jamie Wong with him) (Ranjit Singh & Yeoh) for the respondent.

Hasan Lah JCA:

INTRODUCTION

[1] This is an appeal by the appellant (the plaintiff in the High Court) against the decision of the learned judicial commissioner who allowed the second respondent's (the intervener in the High Court) application to Intervene under O 15 r 6(2)(b)(ii) of the Rules of the High Court 1980 ('RHC').

[2] On 25 August 2009 we allowed the appellant's appeal and set aside the order of the learned judicial commissioner. We now give the grounds for our decision.

BACKGROUND FACTS

[3] The appellant was the legal and beneficial owner of a piece of land held under HS(D) 49071 No PT 48663 Mukim Kuala Lumpur, District of Kuala Lumpur ('the property').

[4] On 17 April 2003 the appellant was put under creditors' voluntary liquidation and two liquidators were appointed as the liquidators of the appellant.

[5] On 7 October 2004 the liquidators discovered that the property was registered under the first respondent's name on 10 September 2004. The appellant, through its liquidators, claimed that it had no knowledge or did not give its consent to the transfer of the property to the first respondent. The appellant claimed that the transfer and registration of the property in the first respondent name was fraudulently done by the first respondent.

[6] The appellant therefore brought this suit against the first respondent seeking the following reliefs:

(a) a declaration that the appellant was the legal and beneficial owner of the property;

(b) an order to set aside the registration under the first respondent's name; and

(c) an order directing the Registrar of Titles, Federal Territory of Kuala Lumpur to cancel the first respondent's registration and reinstate the appellant as the legal and beneficial owner of the property; or

(d) alternatively, damages and interests for loss of the property.

[7] The first respondent was served with the writ and statement of claim by substituted service. The first respondent did not file a defence to the appellant's claim.

[8] By a summons in hambers dated 30 March 2006 (encl 13) the appellant applied for leave to enter judgment against the first respondent. On 26 September 2006 the High Court allowed the appellant's application.

THE SECOND RESPONDENT'S APPLICATION

[9] By a summons in chambers dated 8 January 2007 (encl 22) the second respondent applied under O 15 r 6(2) of the Rules of the High Court 1980 to intervene and be joined as the second defendant in the suit. The second respondent further applied for the judgment obtained by the appellant against the first respondent on 26 September 2006 be set aside and for the appellant to be restrained from dealing with the property until the disposal of the suit.

[10] The second respondent claimed that he had entered into a sale and purchase agreement with the first respondent who was the registered proprietor of the property for the purchase of the property at a purchase price of RM1,500,000. The second respondent lodged a private caveat on 18 October 2004 over the property to protect his interests. He had paid full purchase price by 22 October 2004 and he was given vacant possession of the property by the first respondent.

[11] On or about 15 February 2005, the duly executed memorandum of transfer and Form 19G of the National Land Code was presented at the land office to transfer the property from the first respondent to the second respondent. The application was rejected by the land office because the appellant had lodged a private caveat on 12 October 2004 and a registrar's caveat was also lodged on 21 December 2004.

[12] When the appellant brought this suit against the first respondent, the second respondent was not notified of the suit or was not named as a party. The second respondent claimed that it had an interest to intervene in this suit because the judgment on 26 September 2006, if not set aside, would adversely

affect the second respondent's rights as bona fide purchaser of the property for value and without notice.

DECISION OF THE HIGH COURT

[13] On 2 October 2007 the High Court allowed the second respondent's application whereby the second respondent was allowed to intervene in the suit, the judgment given against the first respondent was set aside, the appellant was estopped from registering itself as the registered proprietor of the property and an injunction was issued to stop the appellant and the second respondent from dealing with the property in any manner whatsoever.

[14] The learned judicial commissioner who heard the second respondent's application held that the second respondent had shown that he had an interest in the judgment obtained by the appellant against the first defendant and as such he was a proper party to appear before the court.

THE APPEAL

[15] One of the issues canvassed before us by learned counsel for the appellant was functus officio. It was submitted that the second respondent had sought to assert his rights to intervene in this suit when the proceedings in this suit had already come to an end. The court had discharged its duty in deciding this case as the final order and judgment in this case had already been drawn up and perfected. In support of her contention learned counsel for the appellant cited the case of *Hong Leong Finance Bhd v Staghorn Sdn Bhd* [2005] 5 MLJ 101; [2005] 2 CLJ 1 and *Hong Leong Bank Bhd (formerly known as Hong Leong Finance) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622.

[16] In response, learned counsel for the second respondent submitted that the judgment obtained by the appellant against the first respondent was a judgment in default and it was not based on merit. As such there was no issue of functus officio. With regard to the decision in *Staghorn* case learned counsel submitted that rules of the court should not be applied where it would create an injustice.

[17] In *Staghorn* case, the plaintiff (Hong Leong Finance Bhd) obtained an order for sale of a piece of land under O 83 of the Rules of the High Court 1980 based on a lien holder's caveat under s 281of the National Land Code. The land was sold to a successful bidder who paid the full purchase price and a certificate of sale was issued in accordance with s 259(3)(a) of the National Land Code. Staghorn then filed an application to intervene and to set aside the order for sale and other consequential orders. The plaintiff appealed against the intervention order. The Court of Appeal held that Staghorn had a right to apply to intervene

and the Court of Appeal agreed with the finding of the High Court in allowing Staghorn to intervene since Staghorn was claiming that its rights would be affected by any judgment in the proceeding of this case and that it should not be deprived of a chance to be heard.

[18] On appeal to the Federal Court the Federal Court allowed the plaintiff's appeal. Abdul Hamid Mohamad CJ made the following observations in paras 65 and 67 of his judgment at p 647:

> [65] With respect, the approach is clearly wrong. In an application to intervene by a non-party in a proceeding all that a judge has to do is, first, to determine whether there is a proceeding still pending. Where a final order, in this case the order for sale, has been made and perfected clearly the proceeding has concluded. It is then too late to intervene under O 15 r 6(2)(b)(ii) of the RHC.
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> [67] Thirdly, in an application to intervene under O 15 r 6 of the RHC, the issue of functus officio merges with the issue whether there is any proceeding still in existence. It is another way of looking at the same thing. The issue is whether the final order has been made and perfected, not whether the judge is of the opinion that the order made by the earlier judge is, in his view, right or wrong in law.

[19] In *Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 MLJ 275 an application was made by a summons in chambers under O 15 r 6(2) of the Rules of the High Court 1980 by the applicant, a minority shareholder in a company to intervene where default judgment had been entered against the company. Shaik Daud JCA said at pp 277–278:

> Next is, when should such an application be made. Although O 15 r 6(2) states that such an application could be made 'at any stage of the proceedings', this does not mean that such an application can be made after final judgment had been entered. In *Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors* [1990] 3 MLJ 254, the court held that O 15 r 6 only applies to proceedings where the substitution of any of the parties to the cause or matter is made before final judgment. In that case, the application was made after a default judgment had been finalised. See also *United Asian Bank Bhd v Personal Representative of Roshammah (decd) & Ors* [1994] 3 MLJ 327. A default judgment once perfected is a final judgment. See the case of *Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors* [1989] 1 MLJ 252, which held that a default judgment which had been perfected is a final judgment and the court there refused to exercise its discretion under O 15 r 6(2) of the RHC to remove the first plaintiff on the ground that he had no cause of action against the second and third defendants in the writ against whom judgment in default of defence had been entered and perfected.

[20] In the instant case the judgment given by the High Court on 26 September 2006 against the first respondent was based on merits as it was given

after the court heard submissions from the appellant's counsel and read the cause papers filed. In any event, the final order had been drawn up and perfected. As such the proceedings in the instant case had clearly concluded. It was therefore too late for the second respondent to intervene under O 15 r 6(2)(b)(ii) of the Rules of the High Court 1980 ('RHC').

[21] For the aforesaid reasons, we were satisfied that the learned judicial commissioner erred in his decision in allowing the second respondent's application in encl 22. We therefore allowed the appellant's appeal with costs, which was fixed at RM10,000 to be paid by the second respondent. The order and the injunction made by the learned judicial commissioner were therefore set aside.

Appellant's appeal allowed with costs.

Reported by Kanesh Sundrum